

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
IRA HAYES FUCHS	:	DETERMINATION
	:	DTA NO. 812323
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through February 28, 1986.	:	

The Division of Taxation, by its representative, William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated May 24, 1994 for an order of summary determination on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notices of determination. In response, Arthur Yorkes & Company (Irwin Greschler, CPA), representative for petitioner, Ira Hayes Fuchs, filed an affidavit in opposition to the motion for summary determination dated June 2, 1994. Based upon the motion papers, the affidavits, and all pleadings and documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for conciliation conference was properly dismissed as late filed.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, Ira Fuchs, as officer of Micro Installations Inc., two notices of determination and demands for payment of sales and use taxes due dated September 11, 1986 assessing, respectively, sales and use taxes due for the period March 1, 1983 through February 28, 1986 in the amount of \$78,311.85, plus penalty and interest, and additional penalty due for the period June 1, 1985 through February 28, 1986 in the amount of \$5,022.11.

2. On August 5, 1993, petitioner mailed a request for conciliation conference to the Bureau of Conciliation and Mediation Services ("BCMS"). The request recites the date of notice/assessment as May 17, 1993, the same date as the attached consolidated statement of tax liabilities which sets forth the sales tax at issue.

3. The conciliation conferee issued an order on October 1, 1993 dismissing petitioner's request as late filed.

4. Petitioner filed a petition with the Division of Tax Appeals, dated October 25, 1993, challenging the entire assessment on the grounds that: petitioner did not receive proper notice of the alleged tax deficiency; most of the company's computer systems were sold outside of New York; and the assessment was arbitrary in that there was no prior sales tax examination and thus no basis for the assessment. Attached to the petition was the first page of the aforementioned consolidated statement of tax liabilities.

5. On May 24, 1994, the Division brought a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notices of determination, as required by Tax Law §§ 170(3-a) and 1138(a)(1).

6. In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of William C. Riddervold, Daniel B. LaFar and Charles Brennan, employees of the Division; copies of the two notices of determination issued to petitioner; a copy of the certified mail record containing a list of notices allegedly issued by the Division on September 11, 1986; and a copy of the envelope which contained petitioner's request for conciliation conference and the face page of such request.

7. The affidavit of William C. Riddervold, Program Manager for the Division's Sales Tax Field Audit Management Division, sets forth the Division's general procedure for the preparation and mailing of notices of determination to taxpayers. Mr. Riddervold explains that such notices were always sent by certified mail and receipts were not requested. A certified mail record (PS Form 3877 and AU-372.1) was prepared by a keyboard specialist in the regular

course of business. The certified mail record lists those taxpayers to whom notices were mailed and the certified control number assigned to each notice or group of notices. The affidavit also states that certified control number P-28432 was assigned to the notices issued to petitioner (notice numbers S860911139C and S860911142C).

8. In addition, the affidavit explains that, as a part of his or her regular duties, a member of the Sales Tax Field Audit Management staff verified the names and addresses on envelopes containing the notices of determination against the certified mail record and assigned a sequential certified control number to each envelope. Each number was then recorded on the certified mail record, and all notices identified on the mail record of September 11, 1986 were delivered to the Mail and Supply Section of the Department of Taxation and Finance. The staff member then signed the back of Form AU-372.1, attesting to the delivery of the notices to the mail room.

After the notices were accepted by the United States Postal Service, the mail room returned a postmarked copy of the certified mail record to the Sales Tax Field Office Management Office, with the attestation of Mail and Supply Section employees that the notices were properly deposited in a branch of the United States Postal Service.

9. Mr. Riddervold concludes that, based on copies of the two notices of determination issued to petitioner and the certified mail record for September 11, 1986, such notices were properly sent to petitioner by certified mail. To the best of his knowledge, neither of these notices was ever returned to the Division as undelivered or refused.

10. The mailing record (AU-372.1) attached to Mr. Riddervold's affidavit lists notice numbers S860911139C and S860911142C. These numbers match those on the notices issued to petitioner. On the reverse side of this record are two attestations, each signed by the attester and a witness. The first says that all the notices listed were delivered to the Mail and Supply Section of the Division, and that the envelopes in which they were enclosed, addressed to the taxpayer at the address shown on the notice, were sealed and stamped. The second attestation says that all the notices listed were deposited in a branch of the United States Postal Service in

Albany, New York in sealed postpaid envelopes. Both statements are date stamped September 11, 1986.

11. The PS Form 3877 attached to Mr. Riddervold's affidavit also bears a U.S. Postal Service date stamp of September 11, 1986. This form indicates that article number P-28432 was addressed to "Ira Fuchs, off. of above, 23 W. 9th St. #2R, NY, NY 10011." Three columns over, under the heading "handling charge", the notations "139C" and "142C" appear. Mr. Riddervold explains in his affidavit that the notice numbers in the right hand column of the certified mail record are abbreviated by the last three digits and the final letter of the notice number. It is noted that this form is not signed by a Postal Service employee, and it does not contain totals for the number of pieces listed by the sender and received at the post office.

12. The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. Mr. LaFar states that the certified mail record is the Division's record of receipt by the Roessleville Branch of the United States Postal Service for pieces of certified mail. Mr. LaFar also asserts that the staff's regular procedures were followed in mailing the notices of determination in question to petitioner on September 11, 1986.

13. The affidavit of Charles Brennan, a mail clerk for the Division, also sets forth the regular procedures followed by the mail and supply room staff when delivering mail to the United States Postal Service. Mr. Brennan states that on September 11, 1986 he delivered a piece of certified mail, addressed to petitioner, to the Roessleville Branch of the United States Postal Service. Mr. Brennan attested to this on the AU-372.1.

14. The envelope in which petitioner's request for conciliation conference was mailed bears a U.S. postmark of August 5, 1993. Both the envelope and the face page of the request bear a BCMS received stamp of August 9, 1993.

15. On June 2, 1994 petitioner, by his representative, filed a motion in opposition to summary determination on the grounds that material issues of fact still exist. Specifically,

petitioner asserts that he was not informed as to the basis of the assessment and that:

"Although a Notice of Determination may well have been sent to Petitioner on September 1, 1986, Micro Installations, Inc., by whom Mr. Fuchs was employed, was merged into Docugraphix, Inc. in July, 1986. Mr. Fuchs was terminated from his position in February, 1987. Mr. Fuchs' actual notice of a sales tax problem occurred on May 17, 1993 The request for a conciliation conference was made on August 5, 1993, which is within 90 days of taxpayer's actual notice."

In support of his motion in opposition of summary determination, petitioner submitted a copy of a consolidated statement of tax liabilities and notice of assessment resolution, dated May 17, 1993, which referenced the sales taxes at issue herein.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

"Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact." (Emphasis added.)

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 487 NYS2d 316, 317, on remand, 111 AD2d 138, 489 NYS2d 970, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). If any material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

B. Pursuant to Tax Law § 1138(a)(1), a notice of determination finally and irrevocably fixes the sales tax due unless the person against whom it is assessed applies to the Division of Tax Appeals for a hearing within 90 days of the issuance of such notice. This 90-day period

commences on the date of mailing the notice at issue (see, Tax Law § 1147[a][1]). The Division must mail notices of determination by registered or certified mail, and the mailing of a notice is presumptive evidence of its receipt by the person to whom it is addressed (id.). A taxpayer has the option of requesting a conciliation conference with BCMS in lieu of filing a petition if the 90-day period has not elapsed (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]). If a taxpayer fails to timely file a petition (or a request for a conciliation conference) protesting the notice of determination, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (Tax Law § 2006.4; Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

Where the taxpayer files a petition (or a request for a conciliation conference), but the timeliness of the petition (or request) is at issue, the Division has the burden of proving proper mailing of the notice in question (see, T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The required proof of mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra).

C. Through the evidence it has submitted, the Division has established that the notices of determination in question were, in fact, mailed to petitioner on September 11, 1986.

First, the Division introduced adequate proof of its standard mailing procedures via affidavits of several Division employees involved in the notice generation and issuance process. In particular, the Riddervold, LaFar, and Brennan affidavits generally describe the various stages involved in the preparation and mailing of notices. These affidavits, consistent in all respects with the information listed on the notices in question, directly support the September 11, 1986 date and fact of mailing of the subject notices (see, Matter of Novar TV & Air

Conditioner Sales & Serv., supra; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992).

Second, the Division established that the general issuance procedure was followed on September 11, 1986 in the generation and mailing of petitioner's notices. PS Form 3877, which lists petitioner and is date stamped September 11, 1986 by the United States Postal Service, is "direct documentary evidence of the date and fact of mailing by certified mail" (see, Gonzalez v. Commr., 63 TCM 3087). As explained by Mr. Riddervold, the notations corresponding to petitioner's listing ("139C" and "142C") match the last three digits and final letter of the notice numbers, as set forth in the notices themselves and in the Division's AU-372.1. Given a properly completed Form 3877, a presumption arises that the notices were properly mailed to petitioner (id.).

D. Petitioner has failed to rebut this presumption. First, petitioner's assertion that the 90-day period commenced on May 17, 1993, the date of the notice of assessment resolution and consolidated statement of tax liabilities, is without merit. Such period begins on the date a notice of determination is issued (see, Conclusion of Law "B").

In order to successfully rebut the presumption of receipt which arises once the Division has proven proper mailing, a taxpayer must do more than merely deny having received it (T. J. Gulf, Inc. v. New York State Tax Commn., supra). Rather, he or she must show that routine procedure was not followed or that it was followed so carelessly as to warrant an assumption that the notice was not mailed (id.). In the alternative, the taxpayer could meet his burden by showing that the post office may have failed to deliver the notice (id., citing Ruggerite v. New York State Tax Commission, 64 NY2d 688, 485 NYS2d 517 [holding that taxpayer rebutted presumption where notice was returned as unclaimed]).

E. In the instant case, petitioner has not shown that the Division failed to follow its standard procedure, nor has he shown that the Postal Service may not have delivered it. He did imply, in his affidavit in opposition to the motion for summary determination, that he did not receive the notices of determination because of a July 1986 merger involving his employer and

because his employment was terminated in February 1987. However, although the merger occurred prior to the issuance of the notices on September 11, 1986, there is no indication in the record that this merger resulted in a change of address. Furthermore, petitioner's employment ceased after the issuance of the notices, and therefore the fact of his termination is irrelevant in the instant case. Finally, Mr. Riddervold states in his affidavit that, to the best of his knowledge, neither of the two notices issued to petitioner were ever returned to the Division as undelivered or refused.

F. The Division has, therefore, introduced evidence in support of its motion for summary determination -- namely, that it properly mailed the notices of determination at issue on September 11, 1986 and that the request for conciliation conference was not filed until August 5, 1993. Petitioner has failed to rebut the resulting presumption of receipt. Therefore, the Division, as the proponent of this motion for summary determination, has succeeded in carrying its burden of showing that it is entitled to judgment as a matter of law; there is no material issue of fact in dispute in this case.

G. Accordingly, the Division's motion for summary determination is granted and the petition of Ira Hayes Fuchs is dismissed.

DATED: Troy, New York
August 18, 1994

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE